

***United States Court of Appeals
for the Second Circuit***



APPENDIX

jq ja

Bialkin - direct

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MR. MANDEL: But he wasn't there. He hadn't heard the problems.

THE COURT: I will sustain the objection unless you lay a foundation as to the particular problem that is the subject of this whole line of inquiry.

Q Were you aware, Mr. Bialkin, that Mabel Bleich and Jeanne Donoghue, two limited partners in Newburger, Loeb, were not going to sign the transfer agreement?

A I was aware that that was asserted. I know at the end there was some flap about someone being out of the country and instructions being revoked, and two limited partners or some limited partners being unwilling at the last minute to go ahead with the transaction as the parties negotiated it.

Q Notwithstanding that, did you tell your clients to sign the agreement?

MR. MANDEL: I object to that.

THE COURT: Sustained as to form.

Q Despite that fact --

THE COURT: Being aware.

Q Being aware of that fact, what advice did you give your clients?

A I considered it in the best interest of our clients to work towards the execution of this document.

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2 Q Did you tell them to sign it?

3 A Notwithstanding the possibility that some
4 limited partners would not go along.

5 Q Did you tell your clients to sign it?

6 A I advised my associate to advise the clients.
7 That is the advice of my office which generated from me
8 through intermediaries, perhaps, was yes, that under all the
9 circumstances, we felt the document should be signed.

10 Q Did you hold that view in good faith, Mr.
11 Bialkin?

12 A I hope so.

13 MR. MANDEL: Objection.

14 Q Did you believe that there was -- did you believe
15 in good faith that your clients could legally sign that
16 agreement?

17 MR. MANDEL: Objection. The foundation has
18 not been laid.

19 THE COURT: I will sustain the objection on
20 the grounds of leading.

21 On what basis did you instruct your clients
22 to execute the agreement?

23 THE WITNESS: I thought that in view of the
24 alternatives available to our client in the event the
25 firm should fail, that it was very much in our clients'

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2 interest that the transaction go forward and that every
3 effort should be made to consummate the transaction on
4 terms as finally negotiated.

5 We were anxious at that point that it be
6 signed and that it go through as it apparently did.

7 Q What were the alternatives, Mr. Bialkin, if
8 it wasn't signed and not consummated?

9 A Well, if there were no agreement and no
10 alternative arrangements were made, I assume that the
11 brokerage firm would have been liquidated.

12 MR. MANDEL: Objection to assumption.

13 A Based on our evaluation of the situation, the
14 firm would have had to be liquidated and would be.

15 Q If that happened, based on your knowledge,
16 would there have been anything for the general partners?

17 MR. MANDEL: Objection to that.

18 MR. GRUTMAN: I am asking for an opinion.

19 Q From what you knew, what would there have been
20 for the general partners in the event of liquidation?

21 MR. MANDEL: No foundation has been laid that
22 this witness knew the financials, had the real information,
23 had analyzed it.

24 THE COURT: Are you in a position to give
25 testimony on that subject at this point?

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Bialkin - direct

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1 THE WITNESS: Yes.

2 THE COURT: Overruled.

3 Q May we have your answer? Would there have
4 been anything for the general partners in the event of
5 liquidation?
6

7 A It was my judgment, based on the evaluation
8 of the factors, including the financial statements and
9 the legal documents, that our client would not have
10 recovered all of its assets out of the liquidation of the
11 brokerage firm.

12 Therefore, since our client was entitled to
13 a priority over the general partners, I don't believe we
14 would have been happy if anything went to the general
15 partners.

16 Q So the general partners, what would they have
17 gotten in the event of liquidation?

18 A Nothing.

19 Q How about the limited partners; what would they
20 have gotten in the event of liquidation?

21 MR. MANDEL: Objection.

22 THE COURT: Sustained.

23 MR. MANDEL: Your Honor --

24 MR. GRUTMAN: Withdrawn.

25 MR. MANDEL: May I be heard?

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Bialkin - direct

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THE COURT: There is no question pending.

Q What would have been the consequences to the limited partners in the event of a liquidation?

THE COURT: I sustain that objection, too.

MR. GRUTMAN: As to form?

THE COURT: As to substance.

He already testified as to what he felt would happen to his own clients, and everything else flows from that.

I sustain the objection.

MR. GRUTMAN: Very well.

Q Was the advice that you gave to your clients given in good faith?

A Yes, sir.

Q Did you believe in good faith that that transfer agreement was a legal agreement?

MR. MANDEL: Objection.

MR. GRUTMAN: I will withdraw the question.

Q Did you know of any legal impediment to the validity of that transfer agreement which you told your clients to sign?

A None that discouraged me from recommending that it be signed.

Q Did you know a lawyer by the name of Bob --

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Bialkin - direct

2 MR. MANDEL: I object to that answer, because
3 it's not responsive.

4 The question is, did he know of a legal
5 impediment. He doesn't answer that question. He
6 says he knows of no legal impediment that discouraged
7 him from advising them to sign, which is a different
8 answer entirely.

9 THE COURT: That is still an answer.

10 MR. MANDEL: But not responsive.

11 THE COURT: I will allow it to stand.

12 Q Mr. Bialkin, did you know a lawyer by the name
13 of Robert Samuel Persky from the Finley, Kumble firm in
14 the course of these negotiations?

15 A Yes, sir, he was the lawyer in charge of the
16 transaction on behalf of Newburger, Loeb.

17 Q Did you have personal and direct dealings
18 with Persky in the time that you participated in these
19 negotiations?

20 A I had several conversations with him. I
21 attended at least one, perhaps more, conferences with him
22 and correspondence with him, yes.

23 (At the side bar)

24 MR. GRUTMAN: In view of the general drift of
25 Mr. Mandel's attack on my law firm and Mr. Persky and the

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Bialkin - direct

2 statements made in opening about Mr. Persky's background
3 and unworthiness, it is an appropriate question that I ask
4 this witness who participated in the transactions whether
5 he had any reason to be critical of Mr. Persky or whether
6 he had observed anything in Persky's conduct as the lead
7 lawyer which indicated there was some kind of
8 conspiratorial plan against Gross.

9 MR. SHAW: Or was, at any time acting in any-
10 thing other than the highest standards of the profession.

11 This is relevant in this case, and if it
12 is not relevant now, it becomes relevant later.

13 MR. MANDEL: This is a conclusion not bearing
14 on the particular issues.

15 If a lawyer can give an opinion about the
16 conduct of another lawyer, it's got to be based on specific
17 facts and issues.

18 THE COURT: In my discretion, I sustain the
19 objection.

20 (In open court)

21 MR. GRUTMAN: We have no further questions of
22 Mr. Bialkin.

23 THE COURT: Mr. Shaw, do you have extensive
24 examination?

25 MR. SHAW: I have no questions whatsoever.

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Bialkin - direct/cross

2 THE COURT: Mr. Mandel.

3 CROSS-EXAMINATION

4 BY MR. MANDEL:

5 Q Mr. Bialkin, do you think you ever saw me
6 before today?

7 MR. GRUTMAN: Objection.

8 THE COURT: Overruled.

9 A I think we may have had, but I don't have any
10 specific recollection.

11 Q Do you recall whether you attended any meetings
12 negotiating this Newburger, Loeb transaction at which I
13 attended?

14 MR. GRUTMAN: Mr. Mandel is about to make himself
15 a witness in this case. If he is going to do that, that
16 is objectionable.

17 THE COURT: Overruled.

18 Q Do you doubt it?

19 A If you say you were there, I accept it. I
20 don't recall it.

21 Q During what period of time did you personally
22 attend the negotiation meetings with regard to this
23 Newburger, Loeb transaction?

24 A My diaries would reflect that, Mr. Mandel.
25 The meeting I recall specifically was a meeting which

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Bialkin - cross

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1 started in the afternoon at the offices of Finley, Kumble
2 at which many of the parties were present, perhaps including
3 yours on behalf of Mr. Gross, which lasted until quite
4 late in the evening.
5

6 I recall we went out to dinner with some of the
7 lawyers and resumed there after dinner, and I believe the
8 meeting lasted all night, although I didn't stay.

9 Q Was that about December 30th?

10 A I can't give you the date.

11 Q You don't know whether -- well, do you recall
12 that the actual agreement was finally reached on February
13 11th of 1971? Do you recall that?

14 A No, I don't place the date. I know the
15 time frame, but I can't tell you the date.

16 Q Do you recall that about six weeks before
17 that there had been a meeting for a preliminary agreement
18 about which you had certain reservations?

19 A If that was the meeting at the Finley, Kumble
20 firm where I walked out, if you recall.

21 Q Was that about year end, December 30th?

22 A I don't recall.

23 Q Is it fair to say that basically you did not
24 personally handle this matter between December 30th and
25 the time of closing on February 11th?

1 jq ja Bialkin - cross

2 A No, I assumed primary responsibility for it.

3 Q Did you personally attend the meetings?

4 A Some I did and most I did not.

5 Q Do you have your diary with you?

6 A No, sir.

7 Q Do you recall attending a meeting, any meeting,
8 at which I said --

9 MR. GRUTMAN: Objection.

10 MR. SHAW: Objection, your Honor.

11 This is an indirect way for having Mr. Mandel
12 testify.

13 THE COURT: I would permit it if Mr. Bialkin
14 said he had a memory of seeing Mr. Mandel before. Absent
15 that, I don't see any purpose to the question.

16 MR. MANDEL: It may refresh his recollection.

17 MR. SHAW: I persist in my objection.

18 It's more fundamental than that.

19 MR. MANDEL: There is no question here, your
20 Honor, that this witness may be asked as to what he heard
21 and what he heard in advance of making his decisions.

22 THE COURT: Ask him with regard to the
23 subject matter, Mr. Mandel.

24 BY MR. MANDEL:

25 Q Did you attend any meeting -- well, let me go

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Bialkin - cross

2 backwards.

3 You testified that there are a bunch of
4 different people trying to reach an agreement, and any one
5 of them had the right to say no and walk out; is that
6 correct?

7 A Yes, sir.

8 Q And you had the right to exercise or do that on
9 behalf of your clients; isn't that right?

10 A Yes, sir.

11 Q And you threatened to do it or stated that
12 you would do it?

13 A At one point there was a point in negotiation
14 that was of importance to me, which wasn't agreeable to
15 others, and I felt sufficiently strong about it so that if
16 people weren't willing to agree to that point, we were not
17 willing to go along with the transaction.

18 Q You said, "If I don't get this, there is no
19 deal and I will stick to my legal rights and you
20 can liquidate." Is that a fair statement?

21 A Your words, but that is the music, yes.

22 Q And you felt that you had every right to do
23 that, did you not?

24 A Yes.

25 Q And you would be acting in good faith if you

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Bialkin - cross

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2 did that, would you not?

3 A Well, if I did that, yes. I would hope not
4 to because my evaluation was that it was important that
5 the transaction close.

6 Q At lease if you were not satisfied with the
7 best deal they offered to you, you could in good faith
8 say, "I won't go along with it," and let nature take its
9 course?

10 A I was free to advise my client to do that,
11 yes.

12 Q And the general partners had that same right,
13 didn't they? If they were dissatisfied with the deal they
14 had the right to say, "I'm sorry, Mr. Bialkin," or "I'm
15 sorry, Mr. X, this does not suit us, and we will not agree,
16 so there can't be an agreement. Let there be a liquidation"?

17 A Of course.

18 Q And that is the climate of negotiation,
19 is it not?

20 A Of course, yes. Either people agree or they
21 don't agree.

22 Q If People don't agree and they have rights,
23 and their consent is required, then the agreement can't
24 be --

25 MR. GRUTMAN: That is objected to, since

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Bialkin - cross

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the agreement doesn't include the withdrawal of a partner.

THE COURT: Sustained as to the form of the question.

Q Did there come a time when you heard that somebody had made the assertion that the consent of all of the general partners was required under Section 98 of the partnership law in order to authorize the proposed agreement?

MR. GRUTMAN: It's not general partners. Limited partners.

MR. MANDEL: I meant limited.

Q Of all the partners, general and limited; did you ever hear that?

MR. GRUTMAN: That is not the law.

Q I don't recall discussing that particular point of law, no.

Q You don't recall that?

A No, sir. I may have discussed it.

Q But you have no recollection of that?

A I have no recollection of discussing it.

Q Do you happen to recall that one of the terms of the preliminary agreement was that the Rosenman firm would be required on behalf of the partnership to issue an opinion that the transfer agreement was legally and

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Bialkin - cross

2 validly authorized on behalf of the partnership and
3 would properly convey title; do you remember that?

4 A Mr. Mandel, I did not review the file before
5 coming here, and I don't want to seem vague.

6 I just don't recall any of the intermediate
7 details, I'm sorry. I can review it if you want me to.

8 Q I am not quarreling with you, believe me,
9 Mr. Bialkin.

10 I am just trying to find out what your testimony
11 means and what you knew.

12 Did you ever learn until this day that -- or
13 did you ever hear that sometime before the closing date
14 the Rosenman firm said they had reviewed the question and
15 they were not willing to give an opinion that the agreement
16 could lawfully be consummated without the consent of every
17 limited partner?

18 MR. GRUTMAN: Objection.

19 MR. ESTERMAN: Objection.

20 THE COURT: What ground?

21 MR. GRUTMAN: There is no evidence that that
22 is the case, and there will be no evidence that the question
23 is propounded as the fact.

24 MR. SHAW: I concur in the objection.
25 It is misstating facts.

1 jq ja

Bialkin - cross

2 THE COURT: Come up, gentlemen.

3 (At the side bar)

4 THE COURT: I don't want to get into
5 niceties of how something is phrased.

6 Isn't it the fact that at some point, up
7 to a certain point, it was expected that Rosenman would
8 give an opinion?

9 MR. GRUTMAN: Right, and they demurred.

10 THE COURT: Let's get the phraseology of
11 exactly what happened.

12 MR. GRUTMAN: The Rosenman firm said not that
13 they wouldn't, but couldn't. Notwithstanding which
14 when the Persky draft was prepared, everybody signed it,
15 including Rosenman and his client.

16 THE COURT: If you have an understanding of
17 how these facts were on the evening of this closing and
18 you represent that that is the way it happened --

19 MR. MANDEL: Burak's testimony on deposition
20 is that weeks before the closing, he told Persky he
21 would not sign, when it came to the closing, that he would
22 not give such an opinion; and that when it came to the
23 closing that fact emerged to the surface, and there was
24 a discussion about it.

25 THE COURT: If there is a genuine basis in

jq ja Bialkin - cross

in the depositions for this --

MR. GRUTMAN: There isn't. I hope you use this as a specimen of the reliability of Mr. Mandel. He has deliberately misled this Court. It is not that they refused and said it's illegal. It's simply they were not prepared to do it because they didn't have a precedent on which to base it.

MR. MANDEL: Mr. Burak has said that he reviewed it.

THE COURT: Would your colleague get that for me?

He is getting up to the question of his refusal to get the opinion. That is what the answer says.

MR. MANDEL: He testified that he told Persky before.

MR. ESTERMAN: There is a dispute there.

THE COURT: His answer to the question is, "I assume what you are leading up to is the question with respect to the refusal of my firm to give a legal opinion."

MS. BJORK: That was not weeks before.

THE COURT: That is his answer.

(In open court)

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Bialkin - cross

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BY MR. MANDEL:

Q Did you ever learn that some weeks before the closing Mr. Burak of the Rosenman firm stated that he would not, his firm would not give an opinion that the transaction was legal and validly authorized under Section 98 of the partnership law without the written consent of every limited partner?

A I may have. I have no specific recollection.

Q I think you said you did not attend the closing; is that correct?

A I don't recall attending. The record would show whether I was there or not.

Q Do you recall that at the closing -- by the way, I think you said on direct that Mr. Persky was representing Newburger, Loeb, and by that am I right that you meant Newburger, Loeb Corporation, the buyer?

A He was representing, according to my recollection, the new entity, the company that was being formed to take over.

Q Which was the corporation?

A Yes.

Q And he also in the negotiations represented the individuals forming the new corporation, did he not?

A The principals?

1 jq ja

Bialkin - cross

2 A Yes, Risher and Muh and Kayne and Berkowitz,
3 do you recall that?

4 A I think so, yes.

5 Q Did it ever come to your knowledge that
6 at the closing when Mr. Burak refused to give this
7 opinion of legality and proper authorization without the
8 signatures of Bleich and Donoghue, Mr. Persky said,
9 "I will act as special counsel for the seller and issue
10 that opinion"? Did that ever come to your knowledge?

11 MR. GRUTMAN: Objection.

12 MR. ESTERMAN: Objection.

13 THE COURT: Do you understand such an incident to
14 occur?

15 MR. GRUTMAN: I am not being pettifogging, but
16 he knows that that is not how it happened. The deliberate
17 attempt is so wrong, I think it's foul, and I protest,
18 and I protest vigorously.

19 MR. MANDEL: I object to that.

20 THE COURT: You represented to me that that
21 is your understanding of the events of that evening.

22 MR. MANDEL: That is what the deposition shows.

23 MR. SHAW: Objection.

24 THE COURT: I will permit the question.

25 MR. GRUTMAN: Will your Honor strike it out

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Bialkin - cross

and properly reproach him if that is not what the evidence shows?

THE COURT: If I find it's not given in good faith, I will.

MR. GRUTMAN: Very well.

BY MR. MANDEL:

Q Did that ever come to your attention, Mr. Bialkin?

A I don't have any specific recollection. It may have. It would be not inconsistent with my general recollection, but my instructions to my associate at that time were not such as to cause us not to go forward with the closing, so that trying to reconstruct the memory, I can't answer you yes or no.

There was nothing there that caused me to advise our client that I had any grave reservations about the transaction's consummation.

What you described may very well have happened.

Q You have no recollection of being aware of that problem, is that correct?

A I have no specific recollection. It rings a bell, but I can't testify that it happened.

Q The bell it rings might have occurred after the event; right?

1 jq ja Bialkin - cross

2 I I can't answer that.

3 Q Youdon't know.

4 Did you ever research the question of whether
5 the consent of Bleich and Donoghue was required under
6 Section 98 of the partnership law to properly authorize the
7 sale on behalf of the partnership?

8 A I have no recollection as to whether I ever
9 researched that point.

10 Q As far as you know, you never did; is that
11 correct?

12 A There were a variety of lawyers in my office
13 working on it. I can't say who would have or who would not
14 have. I was satisfied to let my client go through with
15 the transaction because I regarded it as in my client's
16 best interest.

17 Whether all the fine points were well covered,
18 I could not testify to right now.

19 Q Mr. Bialkin, if you had researched the problem
20 and come to the conclusion that Article 98 or Section 98
21 of the partnership law required the consent of every
22 limited partner in writing to authorize this transaction,
23 would you have told your clients to go ahead and sign?

24 MR. GRUTMAN: Objection.

25 MR. ESTERMAN: Objection.

1 jq ja

Bialkin - cross

2 THE COURT: Sustained.

3 Q Mr. Bialkin, you answered my question before
4 by saying that you advised your clients to go ahead with
5 the deal.

6 A What I refered to there --

7 Q Pardon?

8 A What I referred to in that testimony is that
9 perhaps I didn't specifically say go ahead with the deal,
10 but that the instructions to the people in my office working
11 on it were consistent with that instruction.

12 Q Is it fair for me to say that that advise was
13 given without reference or warning to the Section 98
14 problem?

15 A I would not accept that.

16 Q You don't know one way or the other?

17 A I can't answer your question, but I certainly
18 would not accept that it was given without consideration.

19 Q Can you say that there was consideration?

20 A No, sir. But I certainly can't say that
21 there was none.

22 Q Were you aware that Charles Gross was a partner
23 who had withdrawn under this agreement, withdrawn from
24 the partnership?

25 A I believe I was aware that he was a partner

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2 who had purportedly withdrawn from the partnership.

3 Q Purported to be withdrawn?

4 A Yes.

5 Q Can you explain the qualification about
6 "purporting"?

7 A I am not prepared to evaluate his status as
8 to a partner or a withdrawn partner.

9 Q You didn't look into it then, and you didn't
10 look into it now, and you don't know?

11 A I am not prepared to say that. I may have
12 looked into it then, but I can't recall now. Between
13 four years ago and this moment, nobody asked me what I
14 did four years ago.

15 If you ask me, I would be glad to search my
16 files. I am not prepared to say that I didn't do something
17 that I might ought to have done, and I resent an implication
18 that I didn't advise my client properly.

19 Q I am not criticizing you in any way.
20 I am trying to find out what your testimony on direct really
21 means, and how far it goes.

22 You said there were tiers or a hierarchy of
23 people who were entitled to get the proceeds. I
24 will ask you now whether --

25 A I testified that is the normal situation.

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Bialkin - cross

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Q How about this particular situation? Do you remember where a withdrawn general partner first fit into the picture?

A I recall that our legal position was, whatever the precise status as to where he fit into it was, that our clients' interests should be protected in priority to any existing or withdrawn partner of the firm.

I am not prepared to argue the legal niceties of it because it has been too long ago.

Q Beyond that, do you have any idea or did you then have an idea where a withdrawn general partner fit into the hierarchy? Do you remember the agreement? I don't say you should.

A No.

Q You have testified, I think, that you had somehow reached a conclusion as to what would happen in liquidation; is that correct?

A Yes, sir.

Q On what information did you reach that conclusion?

A We had available to us whatever financial statements were then available pertaining to the affairs of the company. We had available to us a knowledge of what the obligations, the ongoing obligations were of the entity

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Bialkin - cross

1 and based upon an evaluation of the brokerage
2 firm or any other type of company that ceases to do
3 business, its income terminates but its expenses continue
4 until it can relief itself of its ongoing liabilities.
5

6 It was my judgment at that time that if the
7 partnership were wound up without its obligations being
8 assumed, that the likelihood of our clients getting all
9 of their money back within the time frame that seemed
10 reasonable to us was less acceptable than the possibility
11 or likelihood that a reorganized company with some fresh
12 capital coming in might have served their interests
13 better.

14 Really, it's a question of balancing the
15 factors that apper to you to be relevant.

16 Q Do you happen to remember, did you make any
17 investigation as to whether the offices could be sold
18 off in liquidation?

19 A I don't recall making an investment. I am
20 sure it came up in the discussions.

21 If there had been plans to sell off the
22 offices and they were drawn to our attention, we would have
23 considered that in our evaluation, but I don't recall what
24 the plans were.

25 Q Do you happen to remember whether there was

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Bialkin - cross

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2 any liability in December of 1970 to brokerage customers?

3 Q My recollection is that substantially all of
4 the retail accounts had been delivered out to some other
5 firm but I don't have any specific recollection.

6 Q Delivered out to W. E. Hutton; is that right?

7 Does that refresh your recollection?

8 A It sounds familiar, yes.

9 Q Do you remember what the amount of the
10 'limited partners' capital was?

11 A No, sir.

12 Q Do you remember what the total amount of the
13 subordinated partners' capital was?

14 A No, sir. I haven't looked at the financial
15 statements since the transaction.

16 Q And the financial statements which you looked
17 at were not audited statements, were they? They were
18 internally generated spread sheets and so forth; do you
19 remember that?

20 A Well, there were a variety of financial
21 statements, and I am sure included among them was the
22 surprise audit for some prior period.

23 Q Do you remember the period?

24 A No, sir.

25 Q You don't know how contemporaneous that was?

1 jq ja

Bialkin - cross

2 A No, sir.

3 Q Do you happen to remember that it was part
4 of this deal or whether it was part of this deal that
5 very substantial sums of debt owed by general partners
6 would be forgiven?

7 A Owed by general partners to the partnership?

8 Q To the firm, to the partnership.

9 A Until you mentioned it, it hadn't been in
10 the forefront of my recollection about it. I don't recall
11 whether there was a forgiveness of debt or not. I do
12 recall that we insisted at one point on going into the
13 financial position of each of the general partners and,
14 in fact, insisted on some kind of tieup of expected income
15 tax refunds.

16 So it wouldn't surprise me that there was a
17 forgiveness of debt which would have been, if anything,
18 in a sense an empty gesture, but I can't testify that there
19 was not.

20 Q Do you recall that some general partners got
21 about half a million dollars of forgiveness of debt?

22 MR. GRUTMAN: That is objected to, since it's
23 ambiguous. It sounds like some person's getting that.

24 A I don't remember.

25 Q You don't recall that one way or the other?

1 jg ja

Bialkin - cross

2 A It has a familiar sound, but I don't have a
3 recollection of that term, no.

4 Q Do you recall that under this partnership agree-
5 ment --

6 MR. SHAW: Objection. As of this point
7 the partnership agreement is not in evidence.

8 THE COURT: This is the transfer agreement?

9 MR. GRUTMAN: The partnership agreement.

10 THE COURT: Let's find out what the answer is
11 going to be.

12 Q Do you recall that under this partnership
13 agreement general partners were required to put up each
14 a certain amount of committed capital and were also allowed
15 to put in additional capital or excess capital?

16 Do you recall anything about that?

17 A No, sir.

18 Q Did you testify on direct about equal treatment,
19 that you thought Mr. Gross wanted unequal treatment or not?

20 A I don't think I testified at all about equal
21 treatment or unequal treatment. I don't recall.

22 Q Do you happen to know whether after the deal
23 was made the limited partners ever got a penny?

24 A I don't recall every hearing --

25 MR. GRUTMAN: I object to that on a number

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Bialkin - cross

2 of grounds. I object to the form of the question since
3 I don't know what he is asking about when he says they
4 never got a penny.

5 THE COURT: Sustained.

6 Q Do you happen to know how your clients fared
7 as a result of this?

8 MR. GRUTMAN: Objection. It's irrelevant.

9 THE COURT: Sustained.

10 Q Do you happen to know what position Mr. Gross
11 took during the negotiations? Do you know why he said
12 he wouldn't go along with the deal?

13 A In specific detail, I do not.

14 Q Do you happen to know why Mrs. Bleich and
15 Mrs. Donoghue wouldn't go along with the deal?

16 A It was my impression that they were not going
17 along with the deal at the recommendation of Mr. Gross,
18 but, again, I knew it at the time. I have been through
19 a lot of liquidations since then, and I wouldn't want
20 to say.

21 Q Did you hear that Mr. Gross thought it was
22 unfair for general partners still liable for all of the
23 debts to be forgiven part of their indebtedness while he,
24 who had money coming to him, because he had excess capital,
25 was to get nothing?

1 jq ja

Bialkin - cross

2 MR. SHAW: Objection.

3 MR. ESTERMAN: Objection.

4 THE COURT: The question is whether he under-
5 stood this as Mr. Gross' position.

6 MR. SHAW: The question is argumentative.
7 It assumes Mr. Gross had money coming to him rather than
8 owing money to the corporation.

9 THE COURT: The question is whether or not
10 this was his understanding of Mr. Gross' position.

11 THE WITNESS: No.

12 THE COURT: The answer is no, and the jury
13 will not take anything in the question as evidence.

14 MR. GRUTMAN: One other objection, under the
15 provisions of the articles of partnership, Mr. Gross had
16 no position. He had no voice as a withdrawn general
17 partner.

18 THE COURT: It's just a question as to whether
19 Mr. Bialkin understood the fact at this time.

20 (Question read)

21 A I don't recall what the grounds were upon
22 which Mr. Gross felt aggrieved. I do recall that he felt
23 aggrieved, and I assume he wouldn't have objected to it
24 if he thought it was fair to him.

25 Beyond that I don't have any specific

1 jq- ja Bialkin - cross

2 recollection.

3 MR. GRUTMAN: I move that be stricken.

4 MR. SHAW: Everything after "I assume."

5 BY MR. MANDEL:

6 Q Do you recall whether or not it was asserted
7 on Mr. Gross' behalf at any negotiating meeting that under
8 the terms of the partnership agreement he was now a
9 creditor?

10 MR. SHAW: Objection.

11 THE COURT: Sustained.

12 Mr. Bialkin does not have a recollection of the
13 grounds.

14 I see no basis for asking that question.

15 Q Charles Lewis attended the closing. He was
16 one of your associates there, was he not?

17 A Yes, sir.

18 Q And your diary would establish definitely --

19 A I'm sorry?

20 Q Your diary would establish definitely whether
21 or not you attended the closing, would it not?

22 A Yes, sir. I don't recall attending the closing.

23 Q You think you probably did not; is that
24 correct?

25 A That is correct.

jq ja

Bialkin - cross

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Q You sent Mr. Lewis, is that correct?

A Yes, sir.

Q By the time Mr. Lewis reported to you what had happened at the meeting, the papers were already signed, is that not right?

A I can't answer that. I don't know. He may have called me beforehand.

Q You don't remember?

A I just don't remember.

MR. MANDEL: No further questions.

MR. SHAW: I have some questions on cross-examination, if I may, or further direct, however you want to characterize it.

THE COURT: I thought you had no questions. How long are we going to be?

MR. SHAW: Ten minutes, perhaps.

THE COURT: How about you?

MR. GRUTMAN: In the confident expectation that Mr. Shaw will do a good job, I may have no questions.

MR. BERKOWITZ: I have one question, your Honor.

CROSS-EXAMINATION

BY MR. SHAW:

Q You indicated that you gave your advise based

1 jq ja

Bialkin - cross

2 upon certain information which you had at your disposal
3 including financial statements, including a research of
4 the law, including conversations with your clients, meetings
5 with the various partners and associates of your firm.

6 In addition to that, had your firm before
7 this --

8 MR. MANDEL: I object to the form of the
9 question.

10 MR. SHAW: It's a summarization.

11 THE COURT: Go ahead.

12 Q In addition, prior to this time in late 1970,
13 early 1971, had you been involved in previous brokerage
14 firm potential liquidations?

15 A Yes.

16 Q Newburger, Loeb was not the first firm in
17 which you represented a person who had an interest which
18 was threatened with suspension by the New York Stock
19 Exchange; correct?

20 THE COURT: How is that relevant to the issues?

21 MR. SHAW: It's relevant, your Honor.

22 THE COURT: What ground?

23 MR. SHAW: Because of the fact that for a
24 period of time the interests were frozen and that a demand
25 was made by Mr. Gross that was improper. I think you

1 jq ja

Bialkin - cross

2 will see it in a moment.

3 THE COURT: I don't understand this as being
4 cross-examination by you on any subject.

5 MR. SHAW: It's an area Mr. Mandel brought out,
6 I believe, your Honor, the basis for the advice he gave.

7 THE COURT: I am not aware of any fact answer,
8 Mr. Shaw, on cross-examination that opened this up.

9 Mr. Bialkin does not have any memory at
10 all of Mr. Gross' position. He is aware he had a position,
11 but he is not aware of what.

12 Am I right about that?

13 THE WITNESS: Yes, your Honor.

14 MR. SHAW: Mr. Bialkin testified as to what
15 would happen on liquidation, and he also testified with
16 respect to what the basis for the advice he gave his
17 client was.

18 I would like to go further in that area.

19 THE COURT: What area?

20 MR. SHAW: The area of what would have
21 happened in the event of liquidation.

22 THE COURT: He testified to that.

23 I sustain the objection.

24 He testified that in his opinion his clients
25 would have gotten some or all of theirs but nobody else.

1 jq ja

Bialkin - cross

2 Am I correct?

3 THE WITNESS: My clients wouldn't have gotten
4 100 percent of their investment back.

5 THE COURT: Therefore, nobody junior to your
6 clients would get anything.

7 THE WITNESS: Yes, junior people would have
8 fared worse.

9 BY MR. SHAW:

10 Q In reaching that opinion, were you in part
11 relying upon the experience which you had in previous
12 liquidations of brokerage firms?

13 A Yes, sir.

14 Q In the course of previous liquidations of
15 brokerage firms in which you had been involved, did you
16 become aware of the 12-month requirement or any month or
17 period of months requirement with respect to the retention
18 of capital in a brokerage firm after notice of withdrawal
19 had been given?

20 MR. MANDEL: I object to that question as to
21 form. I don't know what "you" means.

22 THE COURT: Overruled.

23 I don't see where it is going to take us
24 profitably, but I will overrule it.

25 A I do know that when an application is made

jq ja

Bialkin - cross

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1 to the exchange to approve a form of subordinated loan to a
2 member firm normally they require that the term of the loan
3 be for a period of at least a year or that if it's for a
4 longer period of time, with a prepayment clause there has
5 to be a notice period for prepayment, if that is what
6 you are referring to.
7

8 MR. MANDEL: Is this relevant?

9 MR. SHAW: Yes, it is, please.

10 Q In addition to this requirement with respect to
11 a subordinated lender and the time in which he could be
12 paid back his subordinated loan, did you become familiar
13 with the New York Stock Exchange requirement with respect
14 to the time when a general partner could withdraw hi
15 capital?

16 A You are asking for an evaluation of exchange
17 rules, and my understanding is that the right of any
18 general partner to return of his capital is subject to
19 the approval of the exchange, depending on their view
20 of the financial position of the company, and they have
21 the right to defer it indefinitely if they feel there isn't
22 enough there to provide for payment of people entitled to
23 priorities.

24 Q Do you know if the position that Charles Gross
25 took was that he wanted his capital back then and there, or

1 j-q ja

Bialkin - cross

2 he would not consent and he would cause Bleich and
3 Donoghue not to consent to the transfer agreement?

4 A I don't think it would be fair for me to answer
5 that because I just don't have a specific enough recollection
6 of the conversations to know what was in Mr. Gross' mind at
7 the time. That is consistent with possible explanations,
8 Mr. Shaw, but I don't think I can testify to that.

9 Q At this point in the course of these negotiations,
10 and at any meeting that you were present at in the course
11 of your conversation with any persons who worked on
12 this matter with you, did the matter of a possible claim
13 or claims by Newburger, Loeb against Gross for misconduct
14 or improper behavior or churning or any violation of the
15 partnership agreement or any wrongful conduct come up?

16 A Again --

17 THE COURT: What is your recollection? Do
18 you have a recollection?

19 THE WITNESS: My recollection is that there
20 were discussions of it. Again, no details other than the
21 fact that everybody seemed to be unhappy with everybody
22 else.

23 Q And charges and countercharges were being hurled
24 between the parties?

25 THE COURT: I will sustain the objection.

jq ja

Bialkin - cross

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Q When was the first time you ever heard of Section 98 of the partnership law?

A I can't tell you that.

Q About 25 years ago, 20 years ago?

A Yes.

Q Isn't that a section of the law that you are very familiar with?

A No, no more so than almost any other section of the partnership law.

Q You referred also in the course of Mr. Mandel's questioning to a surprise audit. What did you mean by that, sir?

A At that time one of the requirements of the New York Stock Exchange was that a member firm of the exhibit was obliged to have an annual audit made of its affairs by an outside public accountant, and that the time of the making of that audit was to be selected by the auditor at a time of its own choosing so as to come in, so to speak, to the surprise of the management so they couldn't prepare themselves for the examination on the theory that if it's a surprise they will always be prepared for it.

In fact, it's not always such a surprise, but it means that the audit is done as of a date not certain.

jq- ja

Bialkin - cross

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2 Q How did the surprise audit figure into what
3 subsequently occurred?

4 A I don't recall. That would just be one of the
5 financial statements that we would look at in evaluating
6 the financial position of the company, and I don't recall
7 how current it was.

8 Q In the evaluation of the affairs of the company,
9 did you take into consideration the liabilities of the
10 partnership on long-term leases?

11 A We would have considered that, of course.

12 Q Did you also take into consideration the
13 individual assets of the various general partners?

14 A Yes, of course. We would have made an
15 effort to obtain financial statements of the individual
16 and general partners to see the extent to which they
17 were able to respond to a claim.

18 MR. MANDEL: I am objecting to "we would have."
19 Either it was done or not done. The witness doesn't
20 remember.

21 THE WITNESS: I can rephrase my answer.

22 THE COURT: I think he testified he endeavored
23 to obtain them.

24 THE WITNESS: Yes. My recollection is that
25 there was information available about the general partners.

1 jq ja

Bialkin - cross

2 The extent of it I am not prepared to tell
3 you right now, but we did have evidence of the financial
4 position of each of the general partners.

5 Q What did you conclude, based upon that
6 evidence?

7 A That perhaps with one or two exceptions --

8 MR. MANDE: Your Honor --

9 MR. SHAW: This has been gone into by
10 Mr. Mandel. They made an investigation with respect to
11 the individual financial affairs of each one of the general
12 partners.

13 I am now able to establish or ask what he found
14 in the course of that inquiry.

15 MR. MANDEL: If we are talking about findings
16 and facts and documents, I have no objection.

17 If it's impressions or conclusions, I don't
18 think it's testimony.

19 MR. SHAW: Let's wait, your Honor. I am asking
20 for the witness to indicate what his conclusion was. It's
21 a simple matter.

22 THE COURT: Let's see what the question is.

23 You got information from general partners. Do
24 you remember what the information was?

25 MR. SHAW: Let me go back.

jq- ja

Bialkin - cross

THE COURT: Let me put my question:

Do you remember?

THE WITNESS: Generally the information we had about the general partners was that none of them were in robust financial shape such that we felt they could put substantial additional capital into the firm or respond to a judgment that our clients might obtain against them.

BY MR. SHAW:

Q How about the leases? Did they pay the leases?

A I have no specific recollection other than leases are a continuing obligation that would have to be paid and it would be a burden in priority to our clients' claims.

Q Did you form a conclusion or reach an opinion with respect to whether there would be any benefit to the subordinated lenders by the transfer of the assets of the partnership to the corporation?

THE COURT: He testified to that on his direct examination.

Q Was the benefit in part the fact that the obligations of the partnership were assumed by the corporation?

jq ja

Bialkin - cross

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1
2 A To the extent that I can recollect my analysis,
3 it was that our clients were being asked to extend their
4 accounts for a certain period of time.

5 It was my feeling that if the ongoing or
6 successor company could be kept alive long enough to pay
7 its bills and stay in business, our client might be able to
8 receive its accounts back before the company ran into very
9 substantial additional troubles.

10 Q Did your clients receive stock or subordinated
11 debentures with some sort of interest in the new
12 corporation?

13 A My recollection is that they left their accounts
14 in on a subordinated basis and received a portion of the
15 equity of the new corporation.

16 Q Can you recall if there was any conversation or
17 information which reached you with respect to the fact that
18 there was money owed to the partnership by customers in
19 relation to Westec?

20 I am referring specifically to a suspense account.
21 Did you receive any information about a suspense account
22 in Westec stock?

23 A I remember the name of the Westec Company, but
24 I have no specific recollection as to how that figured in
25 this liquidation.

1 jq ja Bialkin - cross

2 appearing pro se.

3 THE COURT: I was going to ask you to identify
4 yourself on the record.

5 MR. BERKOWITZ: I am Lawrence Berkowitz, attorney
6 pro se, and also an additional defendant on the counter-
7 claims.

8 CROSS-EXAMINATION

9 BY MR. GLATZER:

10 Q Do you have any independent recollection as
11 to whether Mr. Persky or Finley, Kumble represented
12 Messrs. Muh and Kayne and Sloane?

13 A It's my impression or my recollection that he
14 represented Risher and Muh. I don't recall the other name.
15 Again, that is just my impression.

16 CROSS-EXAMINATION

17 BY MR. ESTERMAN:

18 Q Mr. Bialkin, can you tell us all of the
19 negotiations that you have been talking about, do you have
20 any idea over how long a period of time it took during
21 the negotiations when you were negotiating in connection
22 with your client; could you tell us about how long it took
23 in terms of days, weeks?

24 A The active period in the matter ran from the
25 end of '70 to early '71. I think I mentioned earlier

jq ja Bialkin - cross

that it was at least over a period of several weeks,
perhaps months.

Q During this several weeks or months there
was, was there not, discussions, correspondence and
conferences with many attorneys involved in this whole matter?

A Yes, sir.

Q Not just with you, your client and any other
lawyer, but with many lawyers?

A We were one, and I don't think by any means the
most important star in this.

Q There were discussions then with other lawyers
and yourself or your firm?

A Yes.

Q As well as with Mr. Persky or anyone else?

A Quite a number, yes.

Q This was not a negotiation entered into
merely by you and your firm on behalf of your clients and
some other law firm, namely, Finley, Kumble, or anyone
else; it was a combination of many lawyers?

A Yes, it was a round robin, and my recollection
is that counsel representing the principal parties, that
is the firm, had to go through the same type of negotiations
with us as they did with every other creditor or claimant
or party in the transaction.

1 jq ja

Bialkin - cross

2 Q Did your firm receive any memoranda or
3 correspondencethat was circulated to your firm as well as
4 other firms in connection with this problem?

5 A Yes, I am sure we did.

6 Q So that all the firms were kept on notice of
7 what was going on here?

8 MR. MANDEL: I object.

9 A I couldn't testify as to what we did.

10 Q Did you get a distribution sheet on any
11 correspondence that you got?

12 A There were papers that came to us that obviously
13 were sent to other people, of course. Whether we got a
14 copy of every document that any other party received, I
15 couldn't tell you.

16 I believe we were kept adequately informed
17 to permit us to make an informed judgment on behalf of
18 our client.

19 MR. ESTERMAN: Thank you very much.

20 RECROSS EXAMINATION

21 BY MR. MANDEL:

22 Q Did you make any computations at any time as
23 to what you thought would happen in the event of a
24 liquidation?

25 A In terms of written computations I doubt it.

